IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MATTHEW LIVERS, Plaintiff, v. EARL SCHENCK, Cass County Sheriff's Investigator, et al., Defendants.	)	Case No. 8:08 CV 107 **PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION FOR A COMPENSATORY AND PUNITIVE DAMAGES AWARD AGAINST DEFENDANT DAVID KOFOED**

Plaintiff Matthew Livers submits this memorandum in support of his motion for the entry of a final judgment in his favor and against Defendant Kofoed for compensatory damages in the amount of $1.65 million and for punitive damages in an equal amount, for a total of $3.3 million, plus attorney's fees and costs.[1]

On October 22, 2013, the court entered a default judgment against Defendant David Kofoed (Doc. No. 716) based upon Kofoed's failure to answer the Second Amended Complaint (Doc. No. 238), his failure to participate in the preparation of the Final Pretrial Order (*see* Doc. No. 669), and his failure to appear for the scheduled jury trial at 9:00 a.m. on October 22. The court directed Plaintiff to file a written motion for a compensatory and punitive damages award against Kofoed. Doc. No. 714.

There is Factual Basis to Award Substantial Compensatory Damages for Defendant Kofoed's Role in the Violation of Plaintiff's Due Process Rights

Kofoed was named as a co-defendant in Plaintiff's second due process claim for manufacturing and fabricating the evidence that was used to prolong Plaintiff's unjust

[1] Plaintiff will file a separate fee petition against Mr. Kofoed, seeking fees and costs pursuant to 42 U.S.C. § 1988.

pretrial confinement after Plaintiff was falsely accused of the murders of Wayne and Sharmon Stock. *See Livers v. Schenck,* 700 F.3d 340, 351 (8th Cir. 2012); *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002). Kofoed planted Wayne Stock's blood in William Sampson's Ford Contour. Plaintiff's false confession to the murders included statements to the effect that the Ford Contour had been used as the getaway vehicle after the murders. The planted blood was the only physical evidence tying Plaintiff and Nicholas Sampson to the murders and propped up the criminal case against Plaintiff and Sampson after investigators had failed to find a single piece of evidence to corroborate the confession.

Kofoed was also named as a co-conspirator with the Cass County Defendants and the Nebraska State Patrol Defendants in Plaintiff's conspiracy claim, which is predicated upon the agreement of all defendants to cause Plaintiff to be charged and prosecuted for the murders without regard to the facts and the evidence. Kofoed's principal act in furtherance of that conspiracy (the planting of Wayne Stock's blood in the Ford Contour) occurred after Kofoed's co-conspirators had already coerced Plaintiff's false confession. Nonetheless, Kofoed is liable as a co-conspirator for the *entirety* of Plaintiff's injuries. Persons who join a conspiracy are liable for any and all misconduct committed by their co-conspirators – whether or not they participated in the misconduct, planned it *or even knew the details of it* – "so long as the purpose of the tortious action was to advance the overall objective of the conspiracy." *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983); *see also White v. McKinley*, 519 F.3d 806, 816 (8th

Cir. 2008) ("the plaintiff need not show that each participant knew 'the exact limits of the illegal plan…').

The general rule holds for conspirators who only later join the conspiracy. Late joiners are liable for the previous misconduct of their co-conspirators, even if they are unaware of it, for "it is well settled even under civil or criminal conspiracy that one who knowingly joins a conspiracy even at a later date takes the conspiracy as he finds it, with or without knowledge of what has gone before." *Myzel v. Fields*, 386 F.2d 718, 739 n.12 (8th Cir. 1967); *see also United States v. Hoelscher*, 914 F.2d 1527, 1534 (8th Cir. 1990) ("Once a person joins a conspiracy, . . . he assumes full liability for the conspiracy even though he joined in the later stages.").

Nathan Cox, the Cass County Attorney who prosecuted Plaintiff and Nick Sampson (ultimately dismissing all charges against them), testified in his deposition that the case against Plaintiff and Sampson always rested on "two pegs": Plaintiff's confession and Wayne Stock's blood in the Ford Contour. Nathan Cox 5/4/10 Dep. Tr. at 90; Ex. 1 in the Index of Evidence submitted herewith. David Kofoed's criminal wrongdoing created the second "peg" that kept Plaintiff incarcerated for months and facing murder charges despite his complete innocence.

1. Plaintiff's Confession Was Coerced and Furnished No Proof of Plaintiff's Guilt.

The transcript and the video of the April 25, 2006 interrogation of Plaintiff (Trial Ex. 0209 and 0310) furnish ample proof that Plaintiff's confession was false and completely unreliable. Plaintiff has an IQ in the low 60s. *See* Trial Ex. 0349 at p. 5,

Report of Dr. Scott Bresler. He had never been arrested before this case. Defendants William Lambert and Earl Schenck drove Plaintiff from Lincoln to a law enforcement center in Plattsmouth and placed him in a closed interrogation room. Ignoring information from multiple sources that Plaintiff was "slow," "different," in Plaintiff's own words, "dumb as a brick," Defendants O'Callaghan, Lambert and Schenck told Plaintiff in angry and hostile tones that he had "miserably" failed a polygraph examination and that the polygraph results proved irrefutably that he had either killed Wayne and Sharmon Stock or knew who did. In truth, the polygraph was so patently bogus, as Plaintiff's expert Charles Honts would testify, that its only purpose was to serve as an interrogation prop to intimidate Plaintiff.[2]

For several hours, the defendant-interrogators incessantly demanded that Plaintiff confess to the murders. They refused to accept his repeated protestations of innocence.[3] They threatened Plaintiff, graphically, with the death penalty if he did not confess. Among other things, a Cass County Sheriff's Deputy told Plaintiff, "I'm going to walk out that door and I am going to do my level best to hang your ass from the highest tree," and "I will look at you and go piss on you." *See* Trial Ex. 0209 at pp. 90 and 101. The interrogators convinced Plaintiff that, on the other hand, if he did confess, he would be permitted to go home. *See* Trial Ex. 0209, at p. 131 (as his confession is

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[2] The defendants disclosed an expert on polygraph, Greg Adams, to counter Prof. Honts. But, following Mr. Adams's deposition, the defendants elected not to include him on their witness list. *See* Final Pretrial Order, Doc. No. 667. Dr. Honts's report, in which he characterized the polygraph as a likely interrogation prop (*see* p. 11), is included in the Index of Evidence as Ex. 2.

[3] By Dr. Bresler's count, Plaintiff made 133 denials—all of which the defendant-investigators derided or ignored—before he finally began to confess to the murders.

being elicited, Plaintiff asks "well, after that can I go home?"). Gregg McCrary, Plaintiff's police practices expert, provided a report and would testify that the practices used to gain Plaintiff's confession are not only discredited and improper, but are known to create a risk that an innocent subject will confess falsely. Richard Leo, the false confession expert, would agree. The defendants had no expert to dispute these opinions.

The confession itself was spoon fed to Plaintiff. Review of the transcript shows that there is no point at which Plaintiff provides a narrative account of the crime. Instead, he agrees with the assertions of the interrogators implicating himself in the murders. *See* Trial Ex. 0209, at p. 118 (*e.g.,* "Q. And you walk up with that shotgun and you saw them laying in bed, right or wrong. A. Right I guess, right."). Despite the interrogators' efforts, Plaintiff couldn't manage to get the details right. Among numerous errors, Plaintiff incorrectly described the shotgun shells used in the murders as "green or black;" they were red. *See* Trial Ex. 0209 at p. 212. Even after the interrogators prodded Plaintiff to say his accomplice had dropped a flashlight at the scene, Plaintiff's description of the flashlight ("yellow, red, something like that") didn't match the small metallic silver flashlight that had been recovered in the investigation. *See* Trial. Ex. 0209 at p. 262. Plaintiff repeatedly denied turning on a light in the second floor of the Stock home, contradicting evidence from the investigation that the perpetrators had turned on a light. *See, e.g.,* Trial Ex. 0209 at p. 143.

The day after the confession, Plaintiff recanted in full. Among other things, he told one of the interrogators, "I've been just making things up to satisfy you guys and

answering questions just from, you know, basically, fitting an answer to what you guys have been asking." Trial Ex. 0207 at pp. 47-50.

The conclusive proof that Plaintiff's confession is false lies in the complete absence of corroborating physical evidence. Given the horrific blood spatter on the second floor of the Stock home it would have been virtually impossible for anyone who was not a trained assassin to have left the scene without taking away or leaving behind some telltale trace. As Gregg McCrary, the expert in police practice, would have explained, "To assume that these criminally unsophisticated individuals [referring to Plaintiff and Nick Sampson] were able to obliterate all visible, microscopic and submicroscopic evidence is completely illogical." Report of Gregg McCrary at p. 26, attached as Ex. 3 in the Index of Evidence.

Yet the investigation following Plaintiff's April 25 confession failed to produce a shred of corroborating evidence: (1) Plaintiff "confessed" that he wore a Budweiser cap during the murders. Trial Ex. 0209 at p. 144. The cap was seized and examined. Trial Ex. 0072 and 0157. No incriminating evidence was found. Trial Ex. 0157. (2) Plaintiff described the shoes, the jacket and the clothing he supposedly wore during the murders. *See* Trial Ex. 0209 at p. 156. No evidence was found on the shoes, the jacket or the many other pairs of shoes and items of clothing seized from Plaintiff's home. *See* Trial Ex. 0050, 0094 and 0178. (3) Shotguns seized from Plaintiff's father and from Nick Sampson's home were all negative for blood or any other evidence connected them to the crime. *See* Trial Ex. 0105. (4) Will Sampson's Ford Contour was thoroughly searched on April 19 and 20 (before David Kofoed's nefarious involvement) and yielded no trace

of incriminating evidence. Trial Ex. 0122. (5) Plaintiff's car and Nick Sampson's truck were both seized. Trial Ex. 0152 and 0154. No blood or other incriminating evidence was found in either of these vehicles. (6) Plaintiff's confession included the "fact" that he and Nick Sampson had planned the murders in a phone call the Thursday or Friday prior to Easter. *See* Trial Ex. 0209 at p. 197. Phone records for Plaintiff and Nick were subpoenaed and examined. *See* Trial Ex. 0074 and 0100. There was no evidence that Plaintiff had spoken with Nick at any time in the weeks prior to the murders. (7) DNA analysis was performed on a marijuana pipe and an engraved ring that were recovered from the crime scene that did not belong to any member of the Stock family. Trial Ex. 0323. Although the same two DNA profiles were identified on both items, those profiles did not match either Plaintiff or Nick Sampson. *Id.*

In contrast, there was overwhelming physical evidence connecting Gregory Fester and Jessica Reid—the actual perpetrators—to the crime. The DNA profiles from the marijuana pipe and the engraved ring were a match to Reid and Fester. *Id.* The toe area of one of Fester's shoes had Wayne Stock's blood on it. Trial Ex. 0320. In the truck that Reid and Fester had stolen and abandoned in Louisiana, investigators recovered a gray T-shirt from which they recovered both Reid's DNA and Wayne Stock's DNA. Trial Ex. 0321. Investigators recovered from the home in which Reid had been living a handwritten note addressed to Fester with a lurid reference to the murders. *See* Trial Ex. 0359 and 0017. In the same location, they recovered a red shotgun shell similar to the shells recovered at the crime scene. Trial Ex. 0017 and 0260. A similar red shell was found in Fester's jacket pocket. Trial Ex. 0190.

In short, although there was ample evidence against Reid and Fester, Plaintiff's confession—the first "peg" of the case, in Mr. Cox's metaphor—is utterly discredited by the improper methods that were used to secure it, the confession's internal inaccuracies, and the lack of any corroborating evidence (where corroboration was to have been expected).

2. Kofoed faked the finding of Wayne Stock's blood in the Ford Contour.

The second "peg" on which the case against Plaintiff stood—the presence of a microscopic amount of Wayne Stock's blood in the Will Sampson Ford Contour, which Plaintiff "confessed" to driving to and from the crime scene—was simply fraudulent. On September 11, 2009, Defendant Kofoed was charged in the Cass County District Court with the felony crime of Tampering with Physical Evidence based on the allegation that he had planted Wayne Stock's blood in the car. On March 23, 2010, following a bench trial in the case of *State of Nebraska v. David Kofoed*, No. CR09-40, the Cass County District Court entered a judgment of conviction against Defendant Kofoed on that charge. *See* Trial Ex. 0346 (Judgment of Conviction); Trial Ex. 0358 (Transcript of Court's Oral Findings). The conviction has been affirmed by the Nebraska Supreme Court. *State v. Kofoed,* 283 Neb. 767 (2012).

With both "pegs" of the case against Plaintiff discredited, Plaintiff is demonstrably innocent. He never should have been driven to the Plattsmouth Law Enforcement Center and closeted in an interrogation room. He never should have been subjected to an abusive and hostile interrogation. He never should have been charged

with murder. He should not have been confined in the county jail for months. And he should not have been portrayed in the media as the accused in a sensational and horrific murder case.

3. Kofoed acted in conspiracy with the NSP and Cass County defendants.

In the days following Plaintiff's April 25 confession, defendants Lambert and Schenck grew increasingly frustrated with the inability of forensic investigators under Kofoed's command in the Douglas County Sheriff's Crime Scene Investigations Unit to find a shred of corroborating evidence.

Defendant Schenck admitted in his deposition that he considered it part of his investigative responsibilities, along with Defendant Lambert, to go to the Douglas County CSI Unit and to confer with Defendant Kofoed and his staff about what the forensic investigators had "come up with so far, if anything." Earl Schenck 2/12/09 Dep. Tr. at 58, Ex. 4 in the Index of Evidence. Thus, Schenck "was up to CSI quite a bit in the course of this investigation." *Id.* at 431-32. Lambert also acknowledged in his deposition that he stopped by the CSI office on multiple occasions to ask questions and talk about developments in the analysis of the evidence. William Lambert 2/11/10 Dep. Tr. at 472-75, Ex. 5 in the Index of Evidence. In fact, Lambert and Schenck were so ubiquitous at the CSI Unit that forensic investigator Christine Gabig admitted in her deposition to characterizing them as "pains" with respect to their repeated requests for testing and examination of evidence. Christine Gabig, 1/19/10 Dep. Tr. at 233-234, Ex. 6 in the Index of Evidence.

On the morning of April 27, Lambert placed a phone call to Kofoed. Lambert asked Kofoed to re-examine the back seat of Will Sampson's Ford Contour. Lambert Dep. Tr. at 479-80. Lambert knew that the back seat had already been thoroughly examined when the Ford Contour was originally seized on April 19, but Lambert claimed that he wanted Kofoed to examine the seat again to see if "residue" might have been left behind when a shotgun used in the offense was tossed there following the murders. *Id.*

That afternoon, Kofoed asked CSI Investigator C.L. Retelsdorf to accompany him to an impound lot where the Ford Contour was being stored, telling Retelsdorf that he wanted the back seat photographed and examined. While Retelsdorf was performing that task, Kofoed "examined" the underside of the dashboard on the passenger side of the car with a swab and showed Retelsdorf that the swab tested positive for the presence of blood using a field test. Kofoed asked Retelsdorf to swab in the same location, but Retelsdorf's swab was negative for blood. Kofoed told Retelsdorf to document Retelsdorf's findings from the back seat in a report and told Retelsdorf that he would do the same with respect to the "finding" he had made of blood under the dashboard. *See State v. Kofoed*, 283 Neb. 767, 769 (2012).

On the evening of that same day, according to an entry log (Trial Ex. 0186), Lambert went to the CSI Unit at 8:05 p.m. and remained there until 11:20 p.m. The following day, April 28, Lambert was at the CSI Unit again. Lambert Dep. Tr. at 496. Lambert's recollections are hazy as to what conversations he had with Kofoed over the course of April 27 and 28, when exactly those conversations occurred and what exactly

those two discussed. *See id.* at 493-503. Lambert concedes, though, that he and Kofoed discussed the blood finding and its potential importance in the case. *Id.*

In contravention of standard procedure, Kofoed did not prepare a report of the supposed finding of blood in the Ford Contour on April 27. He did not prepare a property report to establish a chain of custody for the swab. Instead, according to his implausible testimony, he merely left the swab on a shelf in the CSI Unit evidence room and forgot about it. *See* David Kofoed 2/11/09 Dep. Tr. at 179-180.

On May 4, investigators received the news—devastating for the case against Plaintiff and Nick Sampson—that the DNA from the marijuana pipe and the ring recovered at the crime scene did not match Plaintiff and Sampson. *See* Trial Ex. 0319 and 0323. On May 5, Defendant Schenck traveled to Douglas County CSI, arriving there at 4 p.m. and remaining for an indeterminate period of time. *See* Trial Ex. 0126. Schenck "couldn't tell you" what his purpose was for making the trip or whom he spoke with while there. Schenck Dep. Tr. at 435.

Three days later, on May 8, Kofoed "discovered" the swab from the Ford Contour, which he had abandoned in the evidence room on April 27, and prepared a report documenting that on that day—May 8, not April 27—he had swabbed under the dashboard and "found" evidence of blood. *See* Trial Ex. 0128. Kofoed prepared chain of custody documents and transmitted the swab to the University of Nebraska Medical

Center for testing. *See* Trial Ex. 0187. The DNA from the blood on the swab was a match to Wayne Stock.[4]

From this course of events—and from the verdict against Kofoed in *State v. Kofoed*—it can be conclusively inferred that Kofoed planted Wayne Stock's blood on the swab and pretended that the blood had come from underneath the dashboard of the Ford Contour. It is reasonable to infer, in addition, that Kofoed's actions were prompted by the insistence of Lambert and Schenck that Kofoed and his team needed to "come up with" something to tie Plaintiff and Sampson to the murders. It is immaterial that there is no direct proof that Lambert and Schenck requested Kofoed to plant evidence. By April 27, Lambert and Schenck were fully committed to convicting Plaintiff and Sampson for the murders based on the confession they had illegally extracted from Plaintiff—without regard to the truth or falsity of that confession.[5] Kofoed got the message—from Schenck's and Lambert's repeated prodding to test and re-test evidence—that the prosecution of Plaintiff and Sampson needed to be helped along with a fraudulent finding. When the DNA from the marijuana pipe and the ring failed to provide what Schenck and Lambert were looking for, Kofoed moved forward with his fraud.

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[4] The bloody shirt that Wayne Stock had worn on the night of his death was in the CSI evidence room at the time of these events. The bag containing the shirt had been opened and resealed. Kofoed's initials were on the tape that resealed the bag. *State v. Kofoed*, 283 Neb. 767, 769 (2012)

[5] Defendant Lambert repeatedly admitted in his deposition that, after Plaintiff's confession, his mind was closed to the possibility that Plaintiff was innocent of the murders. *See, e.g.*, Lambert Dep. Tr. at 345.

A reasonable fact finder could infer that there was a tacit understanding among Lambert, Schenck and Kofoed that some evidence—any evidence—was necessary to keep the case against Plaintiff alive. Kofoed acted in furtherance of that understanding when he planted the blood. Under established law (*see supra* at p. 3), this is sufficient to establish that Kofoed joined the conspiracy to secure Plaintiff's conviction through evidence manipulation and fabrication, without regard to Plaintiff's guilt or innocence. As a co-conspirator, of course, Kofoed is liable for the entirety of the injury that the co-conspirators inflicted upon Plaintiff.

Within weeks after Kofoed planted the evidence, Gregory Fester and Jessica Reid were discovered. The DNA from the ring and the marijuana pipe conclusively tied those two to the crime scene and the other evidence described above (*supra* at p. 7) showed that they committed the murders. Undaunted, Lambert and Schenck coerced and manipulated Reid and Fester into saying that two men from Nebraska committed the crime with them. *See generally* Trial Ex. 0202, 0203, 0204, 0205, 0206, 0316, 0317.

Absent the fabricated blood evidence, the case against Plaintiff likely would have collapsed (despite the heavy handed tactics of Lambert and Schenck, neither Reid nor Fester ever identified Plaintiff or placed him at the crime scene). But County Attorney Cox was unwilling for months to drop the charges against Plaintiff, since Kofoed's fabricated evidence appeared to tie Plaintiff to the crime. *See* Cox Dep. Tr. at 106-107. In other words, had it not been for the blood evidence planted by Kofoed, Mr. Livers would have spent less than two months – rather than seven months – in jail.

The Compensatory Damages against Kofoed Should be Set At $1.65 Million

Plaintiff must be awarded compensatory damages to make him whole for the physical pain and suffering and the mental anguish that he endured as a result of Defendant Kofoed's fraud. *See* EIGHTH CIR. CIVIL JURY INSTR. § 17.70 (2013). Plaintiff has compromised his claims against Kofoed's co-defendants for a combined total of $1.65 million.[6] Obviously, there can be no objective measure of the loss Plaintiff incurred by the pain, suffering and mental anguish he endured and continues to endure. But in the absence of such an objective measure, the sum of $1.65 million provides a fair and appropriate benchmark for assessing the compensatory damages against Kofoed.

Plaintiff, who had never before been charged with or arrested for any crime, experienced the misery of being confined in a spare, isolated cell deprived of the warmth and comfort of family and friends as he faced the prospect of a death sentence

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[6] Kofoed is not entitled to any setoff based on the settlement Plaintiff reached with the other Defendants. As stated in Plaintiff's trial brief, this case involved multiple theories of recovery against multiple Defendants: (1) Coercive and Conscience Shocking Interrogation, against Defendants Schenck, Lambert, O'Callaghan, and Cass County; (2) Reckless Failure to Follow Leads and/or Fabrication of Evidence against Defendants Schenck, Weyers, Kofoed, Lambert, O'Callaghan, and Cass County; (3) False Arrest, against Defendants Schenck, Weyers, Lambert, O'Callaghan, and Cass County; and (4) Civil Conspiracy, against Defendants Schenck, Weyers, Kofoed, Lambert, and O'Callaghan. *See* Plaintiff's Trial Brief (Doc. No. 702) at 5-8. Because this case involved multiple causes of action against various defendants, there is no way for the Court to fix a set off amount. "[I]in a case with multiple theories the burden is on the defendant seeking set-off to establish the amount that should be allocated to each individual theory of recovery. If the defendant fails to do so, any attempt at allocation on the part of the trial judge would be purely speculative and improper." *Valley Air Service, Inc. v. Southaire, Inc.*, 432 Fed.Appx. 602, 606 (7th Cir. 2011).

or life in prison for a crime he did not commit. His small cell at the Cass County Jail forced him to sleep in a bunk only a few feet from the toilet, which had no cover. Trial Ex. 283 to Trial Ex. 306. Gang-related graffiti was scrawled on his mirror. Trial Ex. 284. Plaintiff poured out his anguish from his isolation from his family in a letter he wrote to his parents shortly before Mothers' Day:

> I'm still very afraid that my future looks pretty dim in my eyes. I really need some reasurance [sic] from you guys please. I try to think positive but its [sic] really hard on me. Mom I'm very sorry that Andy, Tami and Steve [Wayne and Sharmon Stock's children; Plaintiff's cousins; his parents' niece and nephews] are not talking to you. They must honestle [sic] think I did this. You guys know damn well that I had nothen [sic] to do with this please believe me when I say this it is the truth.

Trial Ex. 0345.

Plaintiff's wrongful incarceration not only split his family but also ruined his good name in the community. Trial Ex. 328 through Trial Ex. 344 exemplify the countless newspaper articles, many containing close up photographs of Plaintiff, in which he was announced to the world as an accused murderer. As one example, the main headline in the April 17, 2006 edition of the *Omaha World Herald*, Trial Ex. 0339, appeared as follows:

Suspects were at funeral

Sampson

Livers

Two men are arrested and accused of killing a rural Murdock couple.

By John Ferak
WORLD-HERALD STAFF WRITER

The two men accused in the slayings of a Murdock, Neb., couple last week attended the funeral Saturday, authorities said.

And one of the men was at the couple's farm for an Easter Sunday family gathering hours before they were shot.

Matthew D. Livers, 28, of Lincoln and Nicholas B. Sampson, 22, of Palmyra, Neb., were arrested late Tuesday on suspicion of first-degree murder in the shooting deaths of Wayne and Sharmon Stock. The two men were being held at the Cass County Jail in Plattsmouth.

Authorities said Livers is a nephew of Wayne Stock. They said Sampson is Livers' cousin and unrelated to Wayne Stock.

At the couple's funeral, Livers hardly acted like someone suspected of the crime, Jim Stock, a cousin of Wayne Stock, said Wednesday.

Livers introduced Stock to his longtime girlfriend and told him that they were planning to get married next year, Jim Stock said.

"At the funeral, Matt and I shook hands, and he was shedding tears and grieving like the rest of the us," said Stock, who farms outside Murdock. "I've seen Matt over the years at a number of family reunions. He is a happy-go-lucky kid. I've never seen him angry."

Livers told Stock that he was laid off this month from his security job in Lincoln but was about to start a new job as an over-the-road truck driver.

"It's hard to believe and hard to understand what the motive was," Stock said.

Authorities were not commenting about possible motives.

The bodies of Wayne and Sharmon Stock were found in the bedroom of their farmhouse two miles west of Murdock on the morning of April 17. Autopsies found that both were shot in the head at close range with a shotgun.

There was no sign of forced entry, and nothing was reported missing from the house. Investigators have surmised that the Stocks might have left their doors unlocked, a common

See Arrests: Page 2

Seven months in jail would damage any innocent individual, but incarceration was especially painful and traumatic for Plaintiff in large part because he suffers from mental retardation. As Dr. Terry Kupers, Plaintiff's expert in forensic psychiatry wrote in his expert report:

> Mr. Livers is someone whose world is very limited by his developmental disability. Three components of his world - his extended family, his wife Sarah and his good name in the community - were at the core of his being. All three components were severely damaged by the way he was treated from the time of the murders until his release from jail. Now there is a huge rift in his extended family, his intimacy with his wife is impaired as a result of the trauma, and his good name in the community (in Nebraska) has been permanently marred. For someone of average intelligence, these three components would constitute a relatively smaller proportion of a person's entire world. But for Mr. Livers, his family, his partner and his good reputation were just about all he held dear. Thus, damage to these three components would be expected to have a larger negative impact on his well-being, on average, than would be the case for a person of average intelligence.

Trial Ex. 363 at 24.[7]

Plaintiff's wrongful incarceration has damaged his relationship with his stepson Brandon, whom he has raised as his own:

> Mrs. Livers believes her son Brandon was affected by the arrest because Mr. Livers is the only dad he ever knew, and he (Mr. Livers) was taken away. During the entire time Mr. Livers was at the police center and jail, Brandon repeatedly asked where his dad was. He was three. When officers first told her Matt was in jail, they questioned her and said: "M'am, if you don't come clean that little boy will never see his mother again." They threatened to name her as an accessory. She remembers she had food on the stove, waiting for Matt to come home. The officers were very intimidating. They searched the home and took his clothes. Brandon was negatively affected. Now, when he gets angry, he will say he wishes his dad will go back to jail. She feels that the loss of Mr. Livers in Brandon's life for seven months has had lasting effects. Sarah tried to guard Brandon from television coverage of the murders and his dad's prosecution. He had behavior problems at day care at the time, and when he was caught for unacceptable behavior, he would say "you need to put me in jail with my dad." When Matt got out of jail, Brandon sat on his lap and poked him to see if he was real. Sarah's dad is a retired school psychologist, and warned her that Brandon is having trouble.

Id. at 22.

Plaintiff suffers from Post-Traumatic Stress Disorder as a result of his incarceration:

> The triggering events [of PTSD for Mr. Livers] (interrogation and jail and related press and family stigmatization) certainly qualify as a very serious trauma, complicated by the intellectual deficit and inability to understand events. There are intrusive symptoms (nightmares, obsessive memories of the events, distress upon exposure to police or certain family members). There are constrictive symptoms (lack of enjoyment, avoidance of police, avoidance of Nebraska and family there). And there is evidence of increased arousal (concern about who might be coming up

[7] Trial Ex. 363 was received under seal at the hearing in this case on October 22, 2013. Trial Ex. 364, a supplement to Dr. Kupers' report, was also received on October 22 and placed under seal.

> behind him, sleep problems, irritability and anger outbursts, and hypervigilance lest someone attack him or take advantage of him). The symptoms clearly date to the time of the trauma, and have lasted for several years, causing pain and dysfunction (relative to the level of functioning previously and had the trauma not occurred), especially regarding personal/family life and social interactions. Thus PTSD is chronic and causes significant disability.
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> There is also depression (low energy, irritability, anhedonia or inability to enjoy activities that would previously have been enjoyed, social isolation, self-blame and self-criticism regarding his son's emotional difficulties, and lack of initiative and energy to do anything during non-work hours except sit on the couch and watch television). There is also a certain degree of anxiety (feeling unsafe, avoidance of anything related to Nebraska and family there).

Id. at 18-19.

The alienation within Plaintiff's family continues to the present day, as Dr. Kupers' report also documents:

> Family life is quite problematic, and the problems clearly date to the interrogation and time in jail. He remembers going to court for his arraignment and one or two other appearances, he was very scared about what was going to happen, and then he would see his cousins in the audience section of the courtroom, glaring at him. They believed he committed the murders, "and still do to this day." He tells me: "There is a split in my family - some cousins don't relate to me or my parents because they still believe I had something to do with the murders, even though I was cleared." He moved from Nebraska to Texas after he and Sarah were married to avoid the family hostility. Sarah and he had been planning their wedding prior to his arrest, the aunt who was murdered was going to make the cake, and all the cousins were going to be invited. When they did marry in 2007, he didn't invite those cousins because of the family split. It is especially painful for him that his cousin Tammy is so distant - he and she used to be close. She had helped him deal with their grandfather's death the year before his arrest. But since her mother (his aunt) was murdered, they don't even talk because she still blames Mr. Livers for the murders. He is hurt, but he is trying to move on. He feels a similar painful loss in relation to his cousin Nick. They had been close. Nick was arrested for the murders, too. He was exonerated a couple of months earlier than was Mr. Livers. Nick never talked to the

> investigators. Mr. Livers and Nick have been alienated ever since they were released from jail. Mr. Livers has not seen him except for a television appearance they made about the murders.

Id. at 13.

The false charges against Plaintiff and the wrongful incarceration also produced physical pain and suffering in Plaintiff of a highly private nature that continues to the present day. This physical injury is documented in Dr. Kupers' Supplemental Report, which was received in evidence as Trial Ex. 0364 on October 22 and is filed under seal.

The profound injuries and trauma described above justify a compensatory damages award against Defendant Kofoed in the amount of $1.65 million.

The Punitive Damages against Kofoed Should Be Equal to the Compensatory Damages

It would be difficult to overstate the moral turpitude and breach of public trust perpetrated by Defendant Kofoed. He violated the most basic obligation of a forensic scientist – to uncover the truth objectively, not to manufacture evidence. Kofoed planted blood to incriminate Plaintiff and prepared and signed false reports about his supposed discovery. *See* Trial Ex. 0128 and 0187.

Douglas County Sheriff Tim Dunning, who, like others, incorrectly assumed and believed that Kofoed was honorable and honest, has authored a letter of apology to Plaintiff in which he aptly summarizes the moral and legal breach that Kofoed committed:

> Mr. Kofoed's actions … were morally and legally reprehensible. As I attested in the Declaration I offered during the course of your lawsuit, D.C.S.O. personnel are not trained to hide evidence that is favorable to someone who may be accused of a crime, and are absolutely not trained

> to fabricate or manufacture evidence or to lie in a report. I regret that Mr. Kofoed engaged in such actions and thereby caused you harm.

2/14/13 Letter from Dunning to Plaintiff, Ex. 8 in the Index of Evidence.

Defendant Kofoed repeatedly has told elaborate lies under oath. During his criminal trial, he provided a detailed description of swabbing underneath the dashboard of the Ford Contour, while denying that he planted Wayne Stock's blood there. He perjured himself, *inter alia*, by saying he was "just plain old surprised" when he discovered blood in the precise location where he planted it:

> Q. So tell us what happened then, sir, when you swiped underneath the dashboard?
>
> A. I swiped underneath the dashboard. I applied phenolphthalein. And then --
>
> Q. Let me take you back. I'm sorry. Tell us what you did to prepare the paper so that you could swipe underneath the dashboard.
>
> A. I applied distilled water to the paper. And it – Go ahead.
>
> Q. No, sir, please.
>
> A. I applied distilled water to the paper, the filter paper. Then I folded it, put -- and I wiped it across, about 7 ten to 12 inches across the dashboard from left to right with the steering wheel being in the middle. And I took it and I carry around just white paper with me all the time and I put it on a piece of white paper. And then I applied phenolphthalein. And when I apply that, there should not be a reaction. If there is, then it's a false positive. There was no reaction. It's an oxidation process. So then I applied hydrogen peroxide and it turned pink within a couple seconds.
>
> Q. Of what significance is that then, sir?
>
> A. That is a field presumptive for possible blood.
>
> Q. Explain that answer.

A. There are other -- other reactions you can get. It can be nonhuman blood. It's not human specific. And so it's just simply the possibility of it being blood. That's why we just use it as a search tool to try to find blood that's not really visible.

Q. What did you do when you saw that reaction where it turned pink?

A. I informed C. L. Retelsdorf, who was still doing his examination of the back seat area, I told him, I said, "I've got a reaction." **I was just plain old surprised.**

Q. Why's that, sir?

A. Because I didn't expect to get it…

Tr. of Proceedings in *United States v. Kofoed,* at 506-507 (excerpt attached as Ex. 9 in the Index of Evidence). Kofoed repeated these lies in his deposition in this case. *See* Kofoed Dep. Tr. at 139 ("I got a reaction on that filter paper positive for blood, which it reacted very – right away…").

After remaining incommunicado for the final months of this litigation and refusing to comply with the expectation of this Court that he answer the complaint, participate in the preparation of the final pretrial order and appear for trial, Kofoed defiantly asserted his innocence of any wrongdoing to an *Omaha Word Herald* reporter from his home in North Carolina, the day before the scheduled trial: "I took the fall for it. [Nebraska Attorney General Jon] Bruning can get up there and mouth all he wants about it and blame me, but I didn't do anything." J. Duggan, "Men Falsely Accused in 2006 Murders to get $2.6 Million in Settlement," *Omaha World Herald* (October 22, 2013), Ex. 10 in the Index if Evidence, p. 2. There could be no more powerful evidence of Kofoed's continued refusal to accept responsibility for his actions.

Nor is this the first case in which Kofoed planted blood. In 2003, Ivan Henk confessed that he killed his two year old son, Brendan Gonzalez and threw the body into a dumpster. Kofoed planted the boy's blood in the dumpster to corroborate the confession.

In the criminal case against Kofoed, the trial court admitted evidence of Kofoed's planting of blood in the Henk case pursuant to Nebraska Rule of Evidence 404(b) and concluded that Kofoed had planted blood in the Henck case as well. As the Supreme Court of Nebraska stated: "The uncharged extrinsic crime was Kofoed's alleged tampering of DNA evidence during the 2003 investigation of a child's murder. The court found that the State had proved the 2003 act by clear and convincing evidence and had established independent relevance for offering the evidence at Kofoed's trial." *State v. Kofoed*, 283 Neb. 767, 769 (2012). In determining the appropriate measure of punitive damages, this Court should take judicial notice of the findings of the Cass County District Court and the Nebraska Supreme Court with regard to Kofoed's similar manufacture of evidence in the Henk case.

The Stock and Gonzalez investigations are the two *known* cases in which Defendant Kofoed planted blood. It is not known – and may never be known – how many innocent individuals are incarcerated today because Kofoed fabricated evidence.

Plaintiff seeks punitive damages against Kofoed of $1.65 million—an amount equal to the compensatory damages that Plaintiff also seeks. An award in this amount would be a fair application of the Eighth Circuit's jury instruction, which provides:

4.72 DAMAGES: PUNITIVE — CIVIL RIGHTS

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) ____ and if it has been proved that the conduct of that defendant as submitted in Instruction _____ was malicious or recklessly indifferent to the plaintiff's (specify, e.g., medical needs), then you may, but are not required to, award the plaintiff an additional amount of money as punitive damages for the purposes of punishing the defendant for engaging in misconduct and [deterring] [discouraging] the defendant and others from engaging in similar misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction _____.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was. In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff.

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future]. [You may not consider harm to others in deciding the amount of punitive damages to award.]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to [deter] [discourage] the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.

EIGHTH CIR. CIVIL JURY INSTR. § 4.72 (2013).

Plaintiffs' request for punitive damages is based on the following considerations noted in the jury instruction:

"How reprehensible the Defendant's conduct was." As discussed above, Kofoed's conduct was reprehensible in the extreme. Even Sheriff Dunning described Kofoed's actions as "morally and legally reprehensible."

"Deceit": Kofoed's conduct was deceitful on numerous levels. He planted evidence, prepared a false report, and twice lied about his actions under oath, declaring on one occasion, "I was just plain old surprised" to discover blood in Will Sampson's car.

"Intentional Malice": Kofoed's criminal conviction establishes that he intentionally planted evidence. He did so to maliciously concoct a basis to proceed with the prosecution of Mr. Livers.

"Whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff." Kofoed has planted blood at least once, and likely many times, in the past.

"How much harm the defendant's wrongful conduct caused the plaintiff." Kofoed's conduct caused Plaintiff an enormous amount of harm, and was responsible for the bulk of the time Plaintiff spent in jail.

"The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff." A 1:1 ratio of compensatory damages

to punitive damages is conservative. While eschewing bright line rules, the Supreme Court has stated that ratios of 4:1 may approach, but not necessarily cross, the constitutional limit. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003) ("In *Haslip,* in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4–to–1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive.") (citing *Pacific Mut. Life Ins. Co. v. Haslin*, 499 U.S. 1, 23-24 (1991) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581)).

CONCLUSION

For the foregoing reasons, this Court should enter judgment in favor of Plaintiff and against Defendant Kofoed in the total amount of $3.3 million, $1.65 million in compensatory damages and a like amount in punitive damages, plus attorney's fees and costs.

Respectfully submitted,

MATTHEW LIVERS
Plaintiff

By: /s/David M. Shapiro

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel and David Kofoed. In addition, pursuant to the Court's request, the undersigned also caused a copy of the foregoing to be mailed to Mr. Kofoed at his last known address:

David W. Kofoed
6000 Birkdale Valley Drive
Apartment 127
Charlotte, NC 28277

s/David M. Shapiro

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MATTHEW LIVERS, Plaintiff, v. EARL SCHENCK, Cass County Sheriff's Investigator, et al., Defendants.	)	Case No. 8:08 CV 107 **PLAINTIFF LIVERS' BRIEF IN SUPPORT OF MOTION FOR ATTORNEYS FEES AND LITIGATION COSTS AGAINST DEFENDANT KOFOED**

Pursuant to Federal Rule of Civil Procedure 54(d), Local Rules 54.3-.4, and 42 U.S.C. § 1988, Plaintiff Matthew Livers hereby moves for an award of legal fees and litigation expenses against Defendant David Kofoed in the amount of **$1,204,664.07.**

I. FACTUAL BACKGROUND

A. Extent of Legal Work Required by the Case

The *Livers* litigation was an immensely complex case that spanned over six years. Defendants challenged the legal sufficiency of the complaint in motions to dismiss. After those motions were denied in full, the case proceeded to bifurcated discovery regarding qualified immunity. After over a year of discovery, all three groups of Defendants – the Cass County, Douglas County, and NSP Defendants – filed motions for summary judgment on the issue of qualified immunity. Preparing Plaintiff's responses to these motions was a massive undertaking that consumed the summer of 2010, which necessitated organizing and assimilating dozens of depositions and thousands of pages of documents.

After this Court's denial of the motions for summary judgment, *Livers v. Schenck*, No. 8:08CV107, 2011 WL 1197464 (D. Neb. Mar. 28, 2011), Defendants filed an interlocutory appeal to the Eighth Circuit. The Record on Appeal spanned some 12,000 pages, reflecting the complexity of the issues litigated before this Court on summary judgment. Following oral argument, the Eighth Circuit substantially affirmed this Court's decision. *Livers v. Schenck*, 700 F.3d 340 (8th Cir. 12012).

After the Eighth Circuit's remand, the parties completed fact discovery and engaged in expert discovery. Defendants retained five potentially testifying experts; Plaintiff also retained five such experts. All experts were deposed. In total, discovery required the depositions of some 30 witnesses in at least five states and resulted in the exchange of thousands of pages of documents. After the conclusion of fact discovery, Defendants filed a second round of summary judgment motions, necessitating responses from Plaintiff that consumed substantial time. This Court denied these motions in full. *Sampson v. Schenck*, __F.Supp.2d __, 2013 WL 5308302 (D. Neb. Sept. 13, 2013).

Plaintiff's counsel fully briefed all motions in limine, responded to all of Defendants' motions in limine, prepared a proposed final pretrial order in consultation with Defendants, submitted proposed jury instructions, and filed a trial brief. Throughout the case, the parties filed and responded to innumerable procedural motions, resulting in a docket with more than 700 entries.

As the Court may infer from the complexity of the case and the proposed jury instructions, preparation for trial was a monumental undertaking. The parties had

estimated that trial would span four weeks. The case settled against all Defendants except Kofoed on the eve of trial with Plaintiff's counsel fully prepared to proceed.

B. Attorneys Involved in the Case

Numerous attorneys and other legal professionals have worked on this case since October 6, 2007.

1. Attorney Locke E. Bowman

Mr. Bowman is a Clinical Professor of Law and the Executive Director of the Roderick and Solange MacArthur Justice Center at Northwestern University School of Law.

Bowman graduated in 1982 *cum laude* from the University of Chicago Law School, where he was elected to membership in the Order of the Coif (top 10%). He was a judicial law clerk for the Hon. Hubert L. Will in the Northern District of Illinois for two years (1982-1984). Thereafter, he joined the litigation department of the firm then known as Mayer Brown and Platt, where he worked until 1987. From early 1987 through the summer of 1988, Bowman was employed as an Assistant Corporation Counsel for the City of Chicago, working principally on the defense of complex civil rights matters, including the reverse discrimination lawsuits that were filed during the administration of Harold Washington. Bowman left the City and joined the firm of Silets & Martin in 1988, becoming a partner of that firm in 1990. He was briefly a partner with Martin, Brown, Sullivan & Bowman (March through October 1992). Silets & Martin and Martin Brown (its successor firm) specialized in the defense of complex criminal cases in the federal court.

In October 1992, Bowman left the criminal defense practice to become Legal Director of the Roderick MacArthur Justice Center (the "Justice Center"), where he remains employed today. The Justice Center is a privately funded public interest law firm that works through litigation to advance the rights of persons in the criminal justice system who would otherwise not be heard. Highlights of the Justice Center's work may be found on the Center's website: http://www.law.northwestern.edu/legalclinic/macarthur/ The Justice Center was affiliated with the University of Chicago Law School from 1993 through 2006. Since 2006, the Justice Center has been located at Northwestern University School of Law. Bowman has held academic appointments at both institutions, as detailed on the Curriculum Vitae attached as Ex. 1 in the Index of Evidence. Among other teaching responsibilities, Bowman taught in the University of Chicago's Intensive Trial Practice course for many years while he was in residence at The Law School.

Since he joined the Justice Center, Bowman's practice has focused almost exclusively on the litigation of civil rights and public interest matters. A representative sample of the cases for which Bowman has had either lead or substantial responsibility is set out on the attached CV (at pages 4 through 7). The list of cases includes a substantial number of matters in which Bowman has been lead or co-lead counsel in cases tried to the bench or before a jury. That list is incorporated by reference.

Bowman has been named an Illinois Superlawyer each year from 2005 to 2009. His achievements in the civil rights area include, by way of illustration, the following cases in which Bowman was lead counsel:

- *Chicago Reader, Inc. v. Sheahan,* 141 F. Supp. 2d 1142 (N.D. Ill. 2001), a §1983 case involving the First Amendment rights of a reporter who was refused access to the Cook County Jail.
- *United States ex rel. Green v. Peters,* 917 F. Supp. 1238 (N.D. Ill. 1996), a habeas corpus class action lawsuit on behalf of indigent criminal appellants whose appeals were delayed by understaffing of the Illinois State Appellate Defender. (The case catalyzed a massive infusion of resources into that office.)
- *First Defense Legal Aid v. City of Chicago,* 225 F. Supp. 2d 870 (N.D. Ill. 2002), *rev'd*, 319 F.3d 967 (7th Cir. 2003), the first case in a series of systemic and individual civil rights challenges to the Chicago Police practice of detaining witnesses against their will in the course of criminal investigations. (The practice was ultimately discontinued pursuant to an agreed order entered by Judge Holderman in the § 1983 case of *Ayala, et al. v. City of Chicago, et al.,* (N.D. Ill.), in which Bowman also served as lead counsel).
- *Mason v. County of Cook, et al.,* (N.D. Ill.), a § 1983 class action challenge to the practice in Cook County of conducting bail hearings via closed circuit video. (The case catalyzed an end to this practice.)
- *National Ass'n of Crim Def Lawyers v. Chi Police Dep't,* 924 N.E.2d 564 (Ill. App. 1st Dist. 2010), which established that police reports in closed cases

are generally not exempt from disclosure under the Illinois Freedom of Information Act.

- *In re Appointment of Special Prosecutor (Jon Burge cases)*, Cir. Ct. of Cook County (2001), which found that former State's Attorney Richard Devine had a disqualifying conflict of interest and appointed a Special Prosecutor to investigate criminal wrongdoing by former Chicago Police Commander Jon Burge.
- *In re Appointment of Special Prosecutor (David Koschman homicide),* Cir. Ct. of Cook County (2012), which found that State's Attorney Anita Alvarez had a disqualifying conflict of interest and appointed a Special Prosecutor to investigate David Koschman's death and whether there was criminal wrongdoing by the prosecutors and police officers who initially investigated the matter.[1]

Bowman also has a wealth of experience — and a substantial track record of success —in civil rights matters exactly like this one, in which the plaintiff claims that his constitutional rights were violated by a police investigation that resulted in false charges and/or a wrongful conviction. Counting the $1.65 million settlement in this case, Bowman (as either lead or co-counsel) has won over $45 million in verdicts and

[1] Not included in this list are the civil rights cases that Bowman handled as co-counsel in 1987 and 1988 when he was Assistant Corporation Counsel for the City of Chicago. These included trial of a complex reverse discrimination lawsuit involving the exempt ranks of the Chicago Police Department (*Maloney v. Washington* (N.D. Ill.)) and the trial phase of a complex matter involving the City's practice of delaying payment of large tort judgments (reported on appeal as *Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990)).

settlements in civil rights cases on behalf of wrongfully convicted plaintiffs. The other cases in addition to this one are *Jimenez v. City of Chicago*, (N.D. Ill.) ($25 million jury verdict); *Kitchen v. Burge*, (N.D. Ill.) (settled for $6.1 million); *Willis v. Fish,* (Cir. Ct. of Cook County) (settled for $2.6 million); *Bell v. Cummings,* (Cir. Ct. of Cook County) (settled for $1 million); *Wilson v. O'Brien,* (N.D. Ill.) (settled for $3.6 million); and *Tillman v. Burge,* (N.D. Ill.) (settled for $5.375 million).

Mr. Bowman served as lead counsel and as the principal attorney litigating this case since its inception.

2. Attorney Robert Mullin

Mr. Mullin is an experienced trial lawyer with a distinguished career. He is a Fellow in the American College of Trial Lawyers and has an extensive background in the practice of law. Mr. Mullin has tried jury and non-jury cases involving commercial matters, insurance, personal injuries, product liability claims and professional negligence. He is an "AV" rated lawyer in the Martindale-Hubbell Law Directory and is named in the Great Plains Superlawyers list.

Mr. Mullin has served as the Presiding Judge of the Nebraska Commission of Industrial Relations and is a past President of the Nebraska State Bar Association. At the request of the Nebraska Supreme Court, Mr. Mullin was appointed a member of the Supreme Court Practice and Procedure Committee, the Constitutional Revision Committee, and as a member and Chair of the Nebraska Bar Commission. He has also served as an adjunct professor at the Creighton University School of Law teaching trial practice.

Mr. Mullin is a Fellow of the Nebraska State Bar Foundation and the American Bar Foundation.

Mr. Mullin is a 1966 graduate of the University of Nebraska and a 1968 graduate of the University of Nebraska College of Law where he was a member of the Nebraska Law Review.

Mr. Mullin has worked on the *Livers* case since its commencement. His role far exceeded that of "local counsel" — he discussed every major strategic decision in the case with Mr. Bowman, provided invaluable information regarding practices and procedures in Nebraska, deposed several witnesses, spearheaded settlement negotiations, and was prepared to examine numerous key witnesses and to conduct voir dire at trial.

3. Attorney David Shapiro

Mr. Shapiro graduated from Yale Law School in 2005. From 2005-2006, he clerked for Judge Edward R. Becker, United States Court of Appeals for the Third Circuit, in Philadelphia, Pennsylvania. From 2006-2008, he was employed as an Associate at Davis Wright Tremaine LLP in Washington D.C. From 2008-2012, he was employed as a Staff Attorney for the National Prison Project of the American Civil Liberties Union in Washington, D.C. Since 2012, he has been employed as a Staff Attorney at the Roderick and Solange MacArthur Justice Center and as a Clinical Assistant Professor of Law at Northwestern University in Chicago, Illinois.

Mr. Shapiro is admitted to the bars of Illinois; Washington D.C.; the Supreme Court of the United States; the United States Courts of Appeals for the Second, Third,

Fourth, Seventh, Ninth, and D.C. Circuits; and the United States District Courts for the District of Columbia, the Eastern District of Wisconsin, the Northern District of Illinois, and the Central District of Illinois.

Examples of civil rights cases Shapiro has litigated include *Prison Legal News v. DeWitt*, No. 2:10-cv-2594 (D.S.C. 2012), where plaintiffs obtained what is believed to be the largest monetary settlement in U.S. history in a case involving censorship by a correctional facility; *Benkahla v. Federal Bureau of Prisons*, No. 2:09-cv-00025 (S.D. Ind. 2009), the first major litigation to challenge the creation of Communication Management Units, a new type of unit designed to restrict the communications of federal prisoners allegedly connected to terrorism; and *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), in which the en banc court struck down speech restrictions imposed on street performers in the Seattle Center.

Mr. Shapiro became part of Plaintiff's legal team immediately after the Eighth Circuit remanded the case and participated in a particularly intense phase of the case that involved expert depositions, summary judgment briefing, extensive pretrial motions practice, and trial preparation.

4. **Attorney Brittany Parling**

Ms. Parling was a junior attorney and a fellow employed by the Roderick and Solange MacArthur Justice Center. She worked on the *Livers* case from October 2009 through May 2010.

Ms. Parling graduated from the University of Michigan Law School in 2008 and was a law clerk for Judge David W. McKeague, United States Court of Appeals for the

Sixth Circuit, from 2008-2009. She is currently employed as an Associate at Skadden, Arps, Slate, Meagher & Flom LLP.

5. Attorney Steven Drizin

Mr. Drizin is a Clinical Professor of Law at Northwestern University, the Associate Director of Northwestern Law School's Clinical Program, and the Director of Northwestern's Center on Wrongful Convictions. He is a preeminent expert in wrongful convictions and false confessions. Mr. Drizin provided strategic advice and specialized expertise throughout the litigation.

6. Attorney Julia Rickert

Ms. Rickert was a junior attorney previously employed as a fellow at the Roderick and Solange MacArthur Justice Center. Ms. Rickert devoted herself almost exclusively to work on Plaintiff's responses to the 2010 summary judgment motions filed by Defendants.

7. Legal Assistants/Paralegals

Eraena Hart was the principal legal assistant working on the *Livers* case from its commencement. In the months preceding the trial date, the intensity of preparation necessitated the hiring of an additional staff member, Brianne Williams, who devoted her time nearly exclusively to trial preparation.

8. Full Time Summer Work Study Students and Public Interest Law Initiative (PILI) Fellows

Numerous full-time summer work-study students and Public Interest Law Initiative Fellows devoted substantial time to this case over the years.

9. Clinical Law Students

Innumerable law students enrolled in the clinical course taught by Mr. Bowman and Mr. Shapiro have contributed to the case over the years through tasks including, among many others, legal research, preparation of legal memoranda, drafting of briefs and motions, and deposition preparation.

Despite the substantial contributions made by others to the case, Plaintiff requests that a fee award only be awarded for the time spent by for the first four attorneys listed above: Messrs. Bowman, Mullin, and Shapiro, and Ms. Parling. *See infra* Section III.B.

C. Results Obtained

This litigation resulted in a $1.65 million settlement against all Defendants other than Kofoed. This is believed to be the largest verdict or settlement in a civil rights case in Nebraska history. *See generally*, Juan Perez Jr., *Council to Vote on $205,000 in Payout,* Omaha World Herald, Dec. 11, 2007 (stating that a settlement of $205,000 against Omaha law enforcement officers "ranks among the larger settlements in recent years for a civil rights suit");[2] Associated Press, *Nebraska to Pay $500,000 to Man Wrongfully Convicted of Murder*, Oct. 2, 2010 (reporting $500,000 settlement for Joseph White, who was falsely imprisoned for 18 years in connection with the 1985 murder of Helen Wilson in Beatrice, Nebraska).[3] The case also resulted in a substantial published

[2] Article available at: http://www.omaha.com/article/20111217/NEWS01/712179881/1008.
[3] Article available at http://www.1011now.com/news/headlines/104156969.html?storySection=story.

decision by the United States Court of Appeals for the Eighth Circuit, *Livers v. Schenck*, 700 F.3d 340 (8th Cir. 2012).

II. APPLICABLE LAW

In cases arising under 42 U.S.C. § 1983 and other enumerated civil rights statutes, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Attorneys fee awards in civil rights cases are designed ''to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.'' *City of Riverside v. Rivera,* 477 U.S. 561, 578 (1986).

As a starting point for setting an appropriate award, courts consider "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), arriving at a sum commonly referred to as the "lodestar."

Mathematics, however, do not end the inquiry. As the Eighth Circuit has stated, [t]he guidelines for attorney's fees set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), have been approved by this court." *Allen v. Amalgamated Transit Union Local*, 788 554 F.2d 876, 884 (8th Cir. 1977). The *Johnson* factors include: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent, time limitations imposed by the client or the

circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

III. ARGUMENT

A. Plaintiff is Entitled to an Award of Attorneys Fees Against Defendant Kofoed

On October 22, 2013, the Court issued a default judgment against Defendant Kofoed. *See* Doc. No. 716. Plaintiff Livers therefore qualifies as a "prevailing party" and is entitled to an award of fees under 42 U.S.C. § 1988.

B. The Hours for Which Plaintiff Seeks A Fee Award Were Reasonably Expended

By any reckoning, the *Livers* case was among the most complicated individual civil rights cases to take the verge of trial. It took the work of numerous lawyers, legal staff members, and law students. Nonetheless, in the exercise of extremely conservative billing judgment, Plaintiff seeks compensation against Defendant Kofoed only for the work of Mr. Bowman, Mr. Mullin, Mr. Shapiro, and Ms. Parling as follows:

Locke E. Bowman: 1,739.75 hours. *See* Ex. 2.

Robert Mullin: 460.2 hours. *See* Ex. 3.

David M. Shapiro: 253.5 hours. *See* Ex. 4.

Brittany Parling: 207.5 hours. *See* Ex. 5.

These hours are more than reasonable given the complexity and duration of the case. Plaintiff is not seeking an award for any time spent on this case by Attorneys Drizin and Rickert. Rickert alone spent an 245.5 hours on the litigation. Plaintiff also is

not claiming any time spent on the litigation by any legal assistant, law student, or law clerk. *See Tabech v. Gunter,* 869 F. Supp. 1446, 1455 (D. Neb. 1994) ("[F]ees for paralegal and law-clerk work should be allowed at the rates billed to clients for such services if that is the practice in the relevant market.").

C. The Rates Submitted for Attorneys Bowman, Shapiro, and Parling Are Reasonable

Mr. Bowman, Mr. Shapiro, and Ms. Parling submit rates based on the *Laffey* Matrix, which is used by the United States Attorney for the District of Columbia in determining appropriate rates for plaintiffs in fee shifting civil cases. The *Laffey* Matrix rates vary based on the number of years since an attorney's graduation from law school and are adjusted yearly for inflation. The *Laffey* Matrix[4] provides as follows:

LAFFEY MATRIX -- 2003-2014
(2009-10 rates were unchanged from 2008-09 rates)

	Years (Rate for June 1 - May 31, based on prior year's CPI-U)										
Experience	03-04	04-05	05-06	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14
20+ years	380	390	405	425	440	465	465	475	495	505	510
11-19 years	335	345	360	375	390	410	410	420	435	445	450
8-10 years	270	280	290	305	315	330	330	335	350	355	360
4-7 years	220	225	235	245	255	270	270	275	285	290	295
1-3 years	180	185	195	205	215	225	225	230	240	245	250
Paralegals & Law Clerks	105	110	115	120	125	130	130	135	140	145	145

Mr. Bowman began working on the Livers case on October 6, 2007. Mr. Bowman graduated from law school in 1982, and therefore has had more than 20 years of legal

[4] The *Laffey* Matrix is available at http://www.justice.gov/usao/dc/divisions/Laffey_Matrix%202014.pdf.

experience during all times that he worked on this case. Pursuant to the *Laffey* Matrix, the rates for an attorney for with 20 or more years of experience are as follows:

Work performed June 1, 2007-May 31, 2008	$440
Work performed June 1, 2008-May 31, 2009	$465
Work performed June 1, 2009-May 31, 2010	$465
Work performed June 1, 2010-May 31, 2011	$475
Work performed June 1, 2011-May 31, 2012	$495
Work performed June 1, 2012-May 31, 2013	$505
Work performed June 1, 2013-present	$510

Calculating Mr. Bowman's fees at these rates, the reasonable award for his work is **$847,926.25**. *See* Ex. 2.

Mr. Shapiro began working on the Livers case on November 26, 2012. For the period from June 1, 2012 to May 31, 2013, the Laffey Matrix rate for an attorney 4-7 years out of law school is $290. As of June 1, 2013, Mr. Shapiro reached the mark of eight years out of law school. For June 1, 2013 to the present, the Laffey Matrix rate for an attorney with 8-10 years of experience is $360. Accordingly, Mr. Shapiro's rates for this case are as follows:

Work performed June 1, 2012-May 31, 2013:	$290
Work performed June 1, 2013-May 31, 2014:	$360

Calculating Mr. Shapiro's fees at these rates, the reasonable award for his work is **$128,873.00**. *See* Ex. 4.

Ms. Parling worked on the *Livers* case from October 2009 to May 2010. She graduated from law school in 2008. During the period when she worked on the case, her *Laffey* Matrix rate was $225. Calculating Ms. Parling's fees at these rates, the reasonable award for her work is **$51,187.50**. *See* Ex. 5 .

While the *Laffey Matrix* rates reflect the legal market in Washington, D.C. and therefore exceed prevailing rates in Nebraska, use of the *Laffey* Matrix is appropriate in this case for several reasons.

First, the complexity of the *Livers* litigation required counsel with special expertise in constitutional and civil rights litigation. In *Casey v. City of Cabool*, the Eighth Circuit recognized that in some cases, compensating out-of-town counsel at local rates could undermine the very purpose for which Congress enacted a fee-shifting statute for civil rights cases:

> The primary purpose of [fee shifting in civil rights cases] is to promote diffuse private enforcement of civil rights law by allowing the citizenry to monitor rights violations at their source, while imposing the costs of rights violations on the violators. A plaintiff bringing a civil rights action does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest.
>
> In order for such a policy to be effective, Congress felt it appropriate to shift the true full cost of enforcement to the guilty parties to eliminate any obstacle to enforcement. …
>
> Another consideration in determining the reasonableness of the fee is the relevant market involved. *The relevant market for attorneys in a matter such as this may extend beyond the local geographic community.* A national market or a market for a particular legal specialization may provide the appropriate market. *To limit rates to those prevailing in a local community might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel. Civil rights would be more meaningful, then, in those communities (large cities) where experienced attorneys can command their customary fees. This result would be in direct contravention of the purpose of diffuse enforcement through the "private attorneys general" concept.*

12 F.3d 799, 804-05 (8th Cir. 1993) (quotations and citations omitted). *See also Kansas Public Employees Retirement System v. Reimer & Koger Associates* 165 F.3d 627, 631 (8th Cir. 1999) ("[W]hile it is true that the fees and costs awarded to Peat Marwick were based on Chicago hourly rates which were higher than the rates of Kansas City counsel, we cannot conclude that the district court erred or abused its discretion in awarding the fee.").

In this case, as in *Casey*, the complexity of the litigation justified Mr. Livers' retention of Mr. Bowman. Indeed, Mr. Livers requested that Mr. Bowman represent him, and would not have known where to turn if Mr. Bowman had not taken the case. Livers Decl. (Ex. 6) ¶ 3.

Second, in determining an appropriate fee award, "the court must also consider the impact the case will have on the law and on other affected persons." *Taylor v. Jones*, 653 F.2d 1193, 1206 (8th Cir. 1981). This case was a victory for the administration of justice. It leaves behind a significant Eighth Circuit decision, a decision from this Court allowing a *Monell* claim to proceed to trial, and a settlement believed to be the largest ever in a Nebraska civil rights case involving an individual plaintiff. The settlement serves as an important precedent that will likely impact settlements in future meritorious civil rights cases.

Third, several of the *Johnson* factors adopted by the Eighth Circuit, *see supra* Section II, warrant a higher overall reward including, "the time and labor required," "the novelty and difficulty of the questions," "the skill requisite to perform the legal services properly," and the "length of the professional relationship with the client."

Johnson, 488 F.2d at 717-719. This was an extremely time intensive case, a complex matter that required litigators of the highest caliber and an attorney-client relationship spanning over six years. *See supra* Section I.A.

In light of the complexity of the civil rights litigation in which Mr. Bowman and Mr. Shapiro specialize, courts have awarded these attorneys fees equivalent or comparable to the *Laffey* Matrix rates. *Jimenez v. City of Chicago*, No. 09 C 8081, 2012 WL 5512266, at *4 (N.D.Ill. Nov. 14, 2012) ("The Court approves plaintiff's proposed rate of $450 per hour for Locke Bowman of the MacArthur Justice Center. Bowman has practiced law for thirty years, initially as a law clerk for a district judge here, then with a large law firm for several years, eventually for a several years as an associate and then a partner with a white collar criminal defense 'boutique' firm, and as legal director of the Center since 1992. He has extensive experience litigating and trying significant civil rights litigation in this district. He performed at a very high level of skill in the present case. Bowman's closing argument to the jury on the issue of damages was among the best closing arguments—in terms of both content and delivery—that the undersigned judge has observed in thirteen years on the bench. The evidence submitted by plaintiff establishes that Bowman's experience, ability, and reputation make him quite worthy of an hourly rate that places him at or near the top tier of plaintiff's civil rights litigators in Chicago. The Court approves the $450 rate that plaintiff proposes; *indeed, a higher rate might have been warranted had plaintiff requested it*.") (emphasis added); *American Civil Liberties Union v. U.S. Dep't of Homeland Security*, 810 F. Supp. 2d 267, 277 (D.D.C. 2011) (Freedom of Information Act suit involving deaths of immigration detainees; court

calculates fees for Shapiro and other attorneys based on *Laffey* Matrix rates); *Henderson v. Thomas*, No. 2:11cv224, 2013 WL 5493197, at *9 (M.D. Ala. Sept. 30, 2013) (Section 1983 lawsuit involving segregation of prisoners with HIV in Alabama; rates for Shapiro and other attorneys submitted based on *Laffey* Matrix; court states that plaintiffs' counsel "provide[d] extensive evidence that their proposed rates represent the market rate for attorneys of counsel's caliber working on a case of this complexity").

D. The Rates Submitted by Mr. Mullin Are Reasonable

Because he is based in Nebraska, Mr. Mullin's rates are governed by the prevailing rates in his jurisdiction. Mr. Mullin is a highly experienced, highly regarded attorney, and his rates are eminently reasonable:

2007 and 2008	$250.00
2009-November 2011	$270.00
December 2012-present	$275.00

Calculating Mr. Mullin's fees at these rates, the reasonable award for his work is **$123,696.00**. *See* Ex. 3.

E. Plaintiff is Entitled to an Award for Reasonable Litigation Expenses

Plaintiff is also entitled to an award of litigation expenses. *Casey v. City of Cabool*, 12 F.3d 799, 802 (8th Cir. 1993) (affirming award of litigation expenses under § 1988). Plaintiff requests an award of **$52,981.32**. In the exercise of extremely conservative billing judgment, Plaintiff does not request compensation for numerous expenses (including travel expenses for numerous trips to Nebraska) and seeks an award of expenses only for costs associated with depositions.

IV. CONCLUSION

For the foregoing reasons, and pursuant to 42 U.S.C. § 1988, Plaintiff requests a total award of fees and litigation expenses of **$1,204,664.07.**

Respectfully submitted,

MATTHEW LIVERS
Plaintiff

By: /s/David M. Shapiro

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel and David Kofoed. In addition, pursuant to the Court's request, the undersigned also caused a copy of the foregoing to be mailed to Mr. Kofoed at his last known address:

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/s/ David M. Shapiro